IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision :September 27, 2006.

Gulab Singh Vs. State of Punjab

CORAM: **Hon'ble Mr. Justice Virender Singh**

Present: Mr. Atul Lakhanpal, Advocate, for the appellant.

Mr. MS Sidhu, Senior DAG, Punjab.

Virender Singh, J.

Appellant Gulab Singh stands convicted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act (for short the `Act') vide the impugned judgement of learned Additional Sessions Judge, Mansa dated March 21, 1998 and has been sentenced to undergo RI for ten years and to pay a fine of Rs. one lac, in default of payment of fine to further undergo RI for two years. Aggrieved by the said judgement of conviction and sentence, he has preferred the instant appeal.

Briefly, the case of the prosecution runs thus:

On 23-5-1993 Inspector Budh Singh (PW-3), who was posted as Station House Officer of Police Station Bhikhi, District Mansa along with ASI Iqbal Singh (PW1) and other police officials was going in the official vehicle for patrolling on pucca-road from village Heero Kalan to village Khiwa Kalan. One Mohinder Pal Singh son of Darshan Dass

Mahant resident of Heero Kalan was also joined with them. When the police party reached near the minor canal, the appellant was seen on the culvert of the said canal. He was having a jhola (small bag) in his right hand. On seeing the police party, he became nervous and was apprehended on suspicion. After he disclosed his identity, Inspector Budh Singh in order to comply with the provisions of Section 50 of the Act apprised him of his right of getting the search conducted in the presence of a gazetted officer or a Magistrate. He opted to be searched before a gazetted officer. Thereupon DSP Iqbal Singh (PW-2) was called through a wireless message. After he reached the spot, search of the said jhola was conducted. 3 Kgs of opium was recovered from the jhola. 10 grams of opium was separated as sample. The remainder was put in a tin box (dabba tin). The sample was also put in a small tin-box. Two different parcels were prepared in this regard, which were sealed with the seal bearing inscription `BS' (of Inspector Budh Singh) The seal after use was handed over to ASI Iqbal Singh. The case property was taken into possession vide recovery memo- Exhibit PA, which was attested by ASI Iqbal Singh, Mohinder Pal Singh and DSP Iqbal Singh. From the personal search of the appellant Rs. 150/- were recovered, which were also taken into possession vide separate recovery memo. Exhibit PB, attested by the aforesaid witnesses. The grounds of arrest (Exhibit PC) were also prepared att the spot, attested by the same witnesses and thumb marked by the appellant. Thereafter ruqa (Exhibit PD) was sent to the police station on the basis of which formal FIR (ExPD/1) was recorded. Rough site plan (Exhibit PE) was prepared at the spot. Statements of the

witnesses were recorded. On return to the police station, the case property and the sample parcel were kept by Inspector Budh Singh himself, who on 26-5-1993 sent a sample to the office of the Chemical Examiner through Constable Nand Singh (PW-4). The report (Exhibit PG) of the Chemical Examiner indicated the sample substance to be opium. After completion of investigation the appellant was challaned to face trial. He was charged under Section 18 of the Act.

In order to substantiate its case the prosecution examined PW-1 ASI Iqbal Singh, a witness to the recovery. PW2 DSP Iqbal Singh, another witness to the recovery, who also supports the prosecution version. The investigation conducted by Inspector Budh Singh (PW-3) has already been alluded to in the preceding paras. Report of the Chemical Examiner (Exhibit PG) was also tendered into evidence. Constable Nand Singh (PW4) has tendered his affidavit (Exhibit PF) to prove the link evidence as he had taken the sample to the Chemical Analyst. However, Mohinder Pal Singh- independent witness was given up as having been won over. Some other witnesses were also given up as unnecessary.

The plea taken up by the appellant is of false implication. He however, got examined aforesaid Mohinder Pal Singh in defence (given up by the prosecution as having been won over), who deposed that no recovery was effected from the appellant in his presence. He, however, admits his signatures on certain documents i.e. Exhibits PA, PB and PC.

After appreciating the entire evidence the learned trial Court has convicted and sentenced the appellant as already indicated above.

I have heard Mr. Atul Lakhanpal, learned counsel for the appellant, Mr. MS Sidhu and leaned Senior Deputy Advocate General, Punjab. With their assistance I have gone through the entire record.

Mr. Lakhanpal at the very out-set candidly submits that may be in the grounds of appeal, one of the grounds taken is non-compliance of the provisions of Section 50 of the Act, but in the light of the latest judgement of Full Bench of Hon'ble Apex Court rendered in **State of Himachal Pradesh v. Pawan Kumar, 2005(2) All India Criminal Law Reporter 653** the appellant cannot derive any benefit on that aspect and attacks the prosecution case primarily on missing of link evidence contending that the chances of tampering with the case property are not ruled out in this case and the said flaw is enough to discard the prosecution case. In order to strike home his view point, Mr. Lakhanpal submits that the case property was not at all deposited with the Moharrir Head Constable (Incharge of the Malkhana) by Inspector Budh Singh, the Investigating Officer till it was sent to the Analyst. As per the case set up by the prosecution, the recovery was effected on 23.5.1993 and the sample was sent to the Analyst on 26-5-2006 through Constable Nand Singh (PW-4). The sample and the remainder of contraband were kept by Inspector Budh Singh in his own custody as is clear from his statement. According to the learned counsel, Inspector Budh Singh being Station House Officer of the same police station yet he could keep the case property with him only for a day, that too for the purposes of compliance of Section 55 of the Act as the same was to be produced along with the accused before the Illaqa Magistrate.

But keeping the same with him for three consecutive days is fatal and chances of tampering with the same cannot be ruled out especially when Inspector Budh Singh himself was the Investigating Officer and his seal was only used for sealing the sample and the remainder. Dwelling upon his arguments further, the learned counsel contends that even the seal after its use was not handed over to any independent witness and instead it remained with ASI Iqbal Singh (PW-1), who was his subordinate posted in the same police station. This again creates a doubt and strengthens his argument on this material aspect.

Mr. Lakhnapal then submits that there are material discrepancies in the statements of the official witnesses, which knock out the case of the prosecution. It is otherwise not getting corroboration from the independent witness, who was already travelling in the vehicle of the police party. He rather appeared as a defence witness to strengthen the case of the appellant.

On the basis of the aforesaid submissions, Mr. Lakhanpal prays for acquittal of the appellant.

In the alternative, the learned counsel contends that in the event of conviction being upheld, the sentence imposed upon the appellant with regard to default clause may be reduced reasonably to some extent.

Controverting the submissions advanced by Mr. Lakhanpal, the learned State counsel contends that the case of the prosecution is proved to the hilt. There is recovery of 3 Kgs of opium, which could not be planted upon the appellant and even otherwise as no enmity is projected by him.

The recovery was effected in the presence of a senior police official of the rank of DSP and, therefore, false implication is ruled out. The learned counsel then submits that may be the case property was kept by Inspector Budh Singh with him only till it was sent to Analyst, but he made a categoric statement when appeared in the witness box that the same remained in tact with him and the appellant cannot derive any benefit from this.

Although the cases under Narcotic Drugs and Psychotropic Substances Act, have to be dealt with sternly, yet it is the cardinal principle of criminal jurisprudence that the prosecution has to prove the charge beyond any shadow of reasonable doubt. The provisions of the Act are very stringent and in a case of recovery of commercial quantity of contraband, the minimum sentence provided is rigorous imprisonment for ten years and a fine of Rs. one lac, which can even be more on both the counts, as per facts of the case. Hence before the conviction is recorded, the prosecution is supposed to prove its case to the hilt, leaving no room for doubt in the mind of the Court at least on vital aspects and one of them is that there should not be any chance of tampering with the case property at any stage, till it is sent for analysis. In other words, it can be said that any chance of tampering with the case property has to be ruled out by the prosecution and in case it fails on this vital aspect, the benefit must be extended to the accused irrespective of the quantity of the contraband. In the case in hand on the basis of evidence on record, I can safely conclude that the prosecution has miserably failed to prove its case on this issue.

The admitted case of the prosecution is that the case property was kept by Inspector Budh Singh, the Investigating Officer with him till 26-5-1993 when it was sent to the Forensic Science Laboratory. No doubt, in his examination-in-chief he states that till he handled the case property, it remained in-tact. But this simple statement would not be enough to discharge the onus. It cannot be believed that there was no malkhana in the said police station. Some latitude can be given to the Investigating Officer for keeping the case property with him for a day so as to comply with the provisions of Section 55 of the Act but in the case in hand the appellant was not produced before the Illaqa Magistrate on the following day i.e. 24.5.1993 as is evident from the statement of Inspector Budh Singh. This shows that even the provisions of Section 55 of the Act have not been complied with. No doubt the said provisions are directory in nature and non-compliance thereof does not vitiate the trial yet it has its effect in a given case as per facts of the case, where prejudice is shown to have been caused. In the case in hand, this flaw is at least creating doubt in the mind of the Court about the very case set up by the prosecution.

I am appreciating the case of the prosecution on the aforesaid aspect yet from another angle. Mohinder Pal Singh independent witness was joined by the Investigating Officer before conducting the search. DSP Iqbal Singh was also called at the spot after the appellant had opted to be searched in the presence of a gazetted officer. Although two persons were present i.e. one independent witness and the other a senior police official, yet the seal after use was handed over to ASI Iqbal Singh, as is the

admitted position. He was posted in police station Bhikhi. Inspector Budh Singh was Station House Officer. As such, ASI Iqbal Singh was subordinate to Inspector Budh Singh. In order to allay any doubt, or to give sanctity to the recovery, Inspector Budh Singh should have entrusted the seal to the independent witness or at least to DSP Iqbal Singh, who was also a witness to recovery. This is not done in this case and this flaw creates doubt in the mind of the Court to infer that that the sample could be tampered with at any stage till it was sent to the Chemical Examiner. The prosecution case if viewed in the light of the aforesaid facts, then keeping of the case property by Inspector Budh Singh in his own custody for three days can be said to be a vital flaw in the case of the prosecution. which cannot be just ignored. Rather, in my view, it goes deep to the root of the case. It is the duty of the prosecution to prove that from the stage of seizure till sending of sample to the Forensic Science Laboratory, there was no possibility of tampering with it. The case of the prosecution, in my view, fails on this count and, therefore, benefit of doubt must go to the appellant. It has been so observed by this Court in a latest judgement rendered in **Baldev Singh Vs. State of Punjab, 2005(1) RCR (Crl.) 823** (para 12 refers) that till the case property is not dispatched to the office of the Forensic Science Laboratory, the seal should not be available to the prosecution agency and in the absence of such safeguard, possibility of the seal being tampered with, substance being changed and the container being resealed cannot be ruled out. There is another decision rendered by this Court in **Ram Sarup Vs. State of Haryana, 2006(1) RCR (Crl.) 52** in

which there was recovery of 3 Kgs of opium and after sealing the sample the seal was not given to the independent witness and it remained with the DSP and the Investigating Officer. This Court while doubting the credibility of search and seizure observed that retention of seal by the Investigating Officer and the DSP creates a doubt. Consequently the conviction was set-aside.

Although Mr. Lakhanpal has not attacked the case of the prosecution with regard to non-preparation of the CFSL form at the spot, yet I have considered the same on the basis of the evidence on record and am of the view that this weakness is damaging the case of the prosecution to a considerable extent, coupled with the aforesaid flaw. In this regard **Ram Sarup's case** (para 9-supra) and another judgement rendered in **Bhola Singh Vs. State of Punjab, 2005(2) RCR (Crl.) 520** (para 13) may be referred to .

Since I am appreciating the case of the prosecution with regard to credibility of the search, I still find another flaw in it which would indicate that the recovery as projected by the prosecution is not free from doubt. The sample seal (Exhibit P2) prepared by the Investigating Officer is in the shape of a small plain paper (chit), on which the FIR number is mentioned. The First Information Report is registered on the basis of ruqqa sent by Inspector Budh Singh from the spot. It was sent after completing all the formalities, including preparation of the specimen impression seal (Exhibit P2). This shows that the writing with regard to FIR number, date, sections and the police station is made subsequently. The chit is pasted on

form No.29 prepared on 26-5-1993. Inspector Budh Singh himself has prepared the form, as is clear from his initials. The chit (Exhibit P2) is having the seal impression `BS' (of Budh Singh) and it bears the initials of Inspector Budh Singh only. This chit does not contain the initials of DSP Iqbal Singh or that of Mohinder Pal Singh, the alleged independent witness, whereas the documents Exhibits PA, PB and PC contain the signatures of aforesaid two witnesses. In my view, the Investigating Officer should have obtained the signatures of these witnesses or at least that of DSP Iqbal Singh to show that the specimen impression seal was prepared at the spot itself. The same is not done. Admittedly the case property including the sample remained with Inspector Budh Singh till the sample was sent for analysis on 26-5-1993. Therefore, the possibility of preparation of specimen impression seal (Exhibit P2) subsequently during those three days cannot be ruled out. The other weakness in this regard is that even DSP Iqbal Singh (PW2) when stepped into the witness-box does not state that the specimen impression seal (chit) was prepared in his presence. However, ASI Iqbal Singh talks about it. He has obviously toed the line of his immediate superior official. In my view, this flaw also dents the case of the prosecution with regard to credibility of search along with the other infirmities as referred to above.

No other point is left untouched.

As an upshot of the aforesaid discussion, I cannot eschew observing that the prosecution evidence does not enable me to confirm the impugned judgment and the aforesaid discussion inevitably inclines in

favour of the appellant.

Resultantly the instant appeal is allowed, the impugned judgment dated 21-3-1998 is set-aside and the appellant is acquitted of the charge. He is stated to be in custody and shall be released forthwith, if not required in any other case.

[Virender Singh]
Judge

September 27, 2006
`ask'